

U/CONGRESSIONAL AFFAIRS

87-1955

## ROUTING AND RECORD SHEET

SUBJECT: (Optional)

Prompt Payment Act Amendments of 1987, S.328

FROM:

NO.

STAT

DATE

5 May 1987

TO: (Officer designation, room number, and building)

DATE

RECEIVED

FORWARDED

OFFICER'S INITIALS

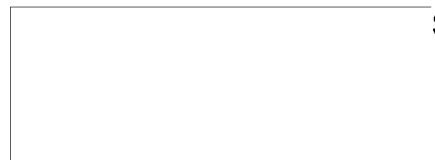
COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

C/L&amp;PLB/OGC

4/ May/87

Rhonda:

This will require people to act a bit faster, but it does not cause any problems unique to CIA.

LD/OCA  
7B14 HQS

27 February 1987  
OCA 87-0706

MEMORANDUM FOR: Chief, Logistics & Procurement Law Division/OGC

FROM:  Legislation Division  
Office of Congressional Affairs

STAT

SUBJECT: Prompt Payment Act Amendments of 1987, S. 328

1. Attached for your review and comment is a copy of the above-captioned bill along with the section-by-section analysis. It is designed to eliminate ambiguities and close the loopholes in the Prompt Payment Act of 1982, which addresses the problems of the Government paying its bills on time to contractors furnishing goods and services. Some 25 percent of Federal agencies continue to pay their bills late and many disregard the resulting late-payment interest penalty. These actions have an adverse impact on small businesses and the bill seeks to protect them. An identical bill was passed unanimously by the Senate in the closing days of the last Congress, but was not considered in the House.

2. Principally, the grace period for late payments is reduced from 16 to eight days; interest penalties are to be paid without regard to whether the business concern has requested such payment; the interest penalty doubles when not paid within 10 days of the actual payment when the business demands such in writing within 40 days after the payment is made; interest is required on progress payments under construction contracts which are due for more than seven days; prime contractors must pay subcontractors promptly or become liable for interest penalties if prompt payments are not made; and the time for calculating the period in which discount payments may be made is narrowed. The Federal Acquisition Regulation is to be modified to reflect the above changes. With regard to the report on late payments which is submitted to the Director of the Office of Management and Budget, the bill adds a requirement to list the number, dollar value and frequency of invoices paid after the due date without payment of an interest penalty, along with an explanation of why no interest penalty was paid.

3. As hearings will be held on this bill on 19 March 1987, I request that you relay your comments to me in writing or via  at your earliest convenience.

STAT

STAT

Attachment:  
as stated

Distribution:

- Orig. - Addressee
  - 1 - D/OCA
  - 1 - DDL/OCA
  - 1 - DD/SA/OCA
  - 1 - DD/HA/OCA
  - 1 - OCA Registry
  - 1 - OCA/LEG/RH Signer
-

S 896

## CONGRESSIONAL RECORD - SENATE

January 22, 1987

"(C) is not paid the interest penalty by the agency within 10 days after the date on which such payment is made; and

"(D) makes a written demand, not later than 40 days after the date on which such payment is made, that the agency pay such a penalty.

Such business concern shall be entitled to receive an interest penalty equal to twice the amount of the interest payment that would otherwise be due."

#### INTEREST PENALTIES ON PROGRESS PAYMENTS AND RETAINED AMOUNTS UNDER CONSTRUCTION CONTRACTS

Sec. 8. Section 3903 of title 31, United States Code, is amended—

(1) by striking out clause (4);  
(2) by redesignating clause (5) as (6); and  
(3) by inserting after clause (3) the following new clause (4):

"(4) In the case of a construction contract, provide for the payment of interest on—

"(A) any progress payment due under the contract for—

"(i) a period of more than 7 days; or  
"(ii) a longer period if the contracting officer determines that the prevailing practice in private construction contracts is to provide such longer payment period; and

"(B) any amount which has been retained during the performance of the contract and are due to be released to the contractor after final acceptance of the construction, if such retained amount is not paid to the contractor by the required payment date;"

#### PERIODIC PAYMENTS UNDER SUPPLY AND SERVICE CONTRACTS

Sec. 8. Section 3903 of title 31, United States Code, as amended by section 5, is further amended by inserting after clause (4) the following:

"(5) provide for periodic payments, in the case of a supply or service contract which authorizes periodic payments and periodic submission of invoices during the contract period, upon—

"(A) submission of an invoice for supplies delivered or services performed during the contract period; and

"(B) either—  
"(i) acceptance of the supplies or services by an employee of an agency authorized to accept the supplies or services; or  
"(ii) certification, by such an employee, that the performance covered by the invoice conforms to the terms and conditions of the contract."

#### PAYMENT CLAUSE FOR SUBCONTRACTS UNDER CONSTRUCTION CONTRACTS

Sec. 7. (a) Chapter 39 of title 31, United States Code, is amended—

(1) by redesignating sections 3905 and 3906 as 3906 and 3907, respectively; and

(2) by adding at the end the following new section 3906:

"§ 3906. Payment clause for subcontracts under construction contracts

"(a) Each construction contract awarded by an agency shall include a clause that requires the prime contractor to include, in each subcontract for property or services entered into by the prime contractor and a subcontractor (including a material supplier) for the purpose of performing such construction contract, a payment clause which obligates the prime contractor—

"(1) to pay the subcontractor promptly (as determined in accordance with prevailing industry standards) out of amounts paid to the prime contractor by the agency for work performed by the subcontractor under that contract; and

"(2) to pay to the subcontractor an interest penalty on amounts due in the case of each payment not made in accordance with such payment clause—

"(A) for the period beginning on the day after the required payment date and ending on the day on which payment of the amount due is made; and

"(B) computed at the most current rate of interest that has been determined by the Secretary of the Treasury for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) and published by the Secretary in the Federal Register.

"(b) A prime contractor's obligation to pay an interest penalty to a subcontractor pursuant to the payment clause included in a subcontract under subsection (a) may not be construed to be an obligation of the United States. A contractor may not obtain reimbursement from the United States for such interest penalty. A contract modification may not be made for the purpose of providing reimbursement of such interest penalty. A cost reimbursement claim may not include any amount for reimbursement of such interest penalty."

(b) The table of sections at the beginning of such chapter is amended by striking out the items relating to sections 3905 and 3906 and inserting in lieu thereof the following:

"3905. Payment clause for subcontracts under construction contracts.

"3906. Reports.

"3907. Relationship to other laws."

#### LIMITATIONS ON DISCOUNT PAYMENTS

Sec. 8. Section 3904 of title 31, United States Code, is amended by inserting after the first sentence the following: "For the purpose of the preceding sentence, the specified time shall be calculated from the date the invoice under the contract is received by the office or employee of the agency designated by the agency to first receive such invoice until the date of payment."

#### REPORTS

Sec. 9. Section 3906(a) of title 31, United States Code (as redesignated by section 7(a)(1)), is amended to read as follows:

"(a)(1) By the 60th day after the end of the fiscal year, the head of each agency shall submit to the Director of the Office of Management and Budget a report on the agency's payment practices, including a description of the extent to which those practices satisfy the requirements of this chapter.

"(2) In addition to such other information as may be required by the Director, the report required by paragraph (1) shall include—

"(A) The number, amounts, and frequency of interest penalty payments, and the reasons the interest penalties were not avoided by prompt payment; and

"(B) the number, dollar value, and frequency of invoices paid after the required payment date without payment of an interest penalty, and the reasons no obligation to pay interest penalties was incurred with respect to such invoices or no amount for interest penalties were included in the payments of such invoices."

#### IMPLEMENTATION THROUGH THE FEDERAL ACQUISITION REGULATION

Sec. 10. (a) The Federal Acquisition Regulation shall be modified to provide appropriate solicitation provisions and contract clauses that implement chapter 39 of title 31, United States Code, and the regulations prescribed under section 3903 of such title.

(b) The solicitation provisions and contract clauses required by subsection (a) shall include the following matters:

(1) Authority for a contracting officer to specify for a contract or class of contracts a specific payment period, which—

(A) in the case of payments for commercial items or services, is similar to the pay-

ment period or periods permitted in prevailing private industry contracting practices;

(B) in the case of payments for noncommercial items and services, does not exceed 90 days unless the circumstances of the procurement action require a longer period for payment; and

(C) in the case of progress payments under construction contracts, does not exceed 7 days, unless the contracting officer determines that the prevailing practice in private construction contracts requires a longer payment period.

(2) Requirements to make periodic payments, in the case of a supply or service contract which authorizes periodic payments and periodic submission of invoices during the contract period, upon—

(A) submission of an invoice for supplies delivered or services performed during the contract period; and

(B) either—  
(i) acceptance of the supplies or services by an employee of the contracting agency authorized to accept the supplies or services; or

(ii) certification, by such an employee, that the performance covered by the invoice conforms to the terms and conditions of the contract.

(3) A conclusive presumption that the Federal Government has accepted property or services by the fifth day after the date on which, in accordance with the terms and conditions of the contract, the property is delivered or final performance of the services is completed, unless the circumstances of the procurement require a longer period for acceptance by the Federal Government and such longer period is specified in the solicitation for such contract.

(4) The limitation that the Federal Government may take a discount offered by a contractor for early payment by the Federal Government only in accordance with the time limits specified by the contractor.

(5) The requirements of section 3902(c) of title 31, United States Code.

(c) The regulations required by subsection (a) shall be published as proposed regulations for public comment as provided in section 22 of the Office of Federal Procurement Policy Act (41 U.S.C. 420) within 120 days after the date of the enactment of this Act.

#### EFFECTIVE DATES

Sec. 11. (a) Section 3(a)(2) and the amendments made by sections 3(a)(1), 4, 5, 6, 7, and 8 shall apply to payments under contracts awarded during or after the first fiscal quarter which begins more than 90 days after the date of the enactment of this Act.

(b) The amendments made by section 3(b) shall apply to payments under contracts awarded on or after October 1, 1988.

(c) The amendment made by section 9 shall apply to the report required by section 3906 of title 31, United States Code, for each fiscal year beginning after September 30, 1987.

#### "PROMPT PAYMENT ACT AMENDMENTS OF 1987"

##### SECTION-BY-SECTION ANALYSIS

##### Section 1. Short Title

This section establishes the bill's citation as the "Prompt Payment Act Amendments of 1987."

##### Section 2. Congressional Findings

This section enunciates a series of congressional findings based upon the four fiscal years of experience with Federal agency billpaying practices since the Prompt Payment Act became effective on

January 30, 1987

## CONGRESSIONAL RECORD — SENATE

S 897

October 1, 1982. The first congressional finding is that the Prompt Payment Act has generally improved the billpaying practices of the Federal agencies. This improvement in timely bill paying has resulted in fairer treatment of the thousands of contractors who furnish supplies, services, or construction to the Federal Government. The general success of the Prompt Payment Act has been particularly important to small business government contractors who are especially sensitive to cash flow from their customers. The succeeding paragraphs of this Section summarize the specific problems that have been identified. Remedies to these implementation problems are set forth in the subsequent sections of the bill.

The section also specifically recognizes that the delegates to the 1986 White House Conference on Small Business adopted a recommendation calling on the Congress and the President to strengthen the Prompt Payment Act of 1982 and ensure that it is vigorously enforced. This recommendation finished as number 32 from a starting agenda of over 400 issue items before the Conference delegates.

### Section 3. Definitions and Application

Subsection (a) of this Section amends the Prompt Payment Act by requiring a clearer definition of the starting point for the time period during which an agency is required to effect payment. The length of time for payment is prescribed by either the contract's specific payment provision or in accordance with the Act's standards. In the absence of such a specific contractual payment term. Under the Prompt Payment Act, the starting point for the "payment clock" is the receipt of a proper invoice by the designated payment office or the date the supplies, services or construction are formally accepted by the Federal agency, whichever is later. Acceptance in government contract practice is distinct from simple delivery of supplies or the completion of the performance of a service. Under the Federal Acquisition Regulation (FAR), acceptance constitutes acknowledgement by the Government that the supplies or services (including construction) conform with the requirements of the contract; it is the point at which title passes to the Government. Given that the time of acceptance is solely in the hands of the federal agency, the agencies are also in control of the starting point of the payment clock.

For example, a contractor makes a timely delivery of supplies specified by its contract to the designated delivery point on June 1st, concurrently furnishing a proper invoice to the designated payment office. The agency formally accepts the supplies on July 31st, some 60 days later. Payment is made on August 30th, within 30 days of acceptance, but 90 days after delivery of the required supplies and the proper invoice. Under the terms of Prompt Payment Act, and current agency practice, the contractor would not be entitled to any late payment interest penalty. Section 3(a) of the bill amends the acceptance provision of the Act by specifying that acceptance is deemed to have been accomplished 5 days after delivery (or final performance) of a service, including construction, unless the contract solicitation specifies a longer period for acceptance. This amendment preserves the Government's right to assure itself adequate time to accomplish acceptance, but also assures that it will inform the contractor of acceptance periods exceeding five days when the contractor is seeking to compete for the contract rather than when he or she is seeking to get paid for work completed. In implementing this provision in the FAR, contracting officers should be accorded the

flexibility to prescribe an acceptance period that comports with the subject matter of the contract. For example, commercial items should require a shorter acceptance period than items fabricated to a Government design specification and not subject to inspection prior to shipment. Since acceptance time periods will now have to be announced in the contract solicitation, permitting competing contractors to adjust their prices to account for the financing costs associated with exceptionally long acceptance periods, the implementing procurement regulations should strongly encourage that acceptance periods be kept to the minimum required based on experience.

Finally, it is emphasized that the amendment does not compel the Government to pay for supplies or services (including construction) that it has not had the opportunity to inspect and accept. Rather, it merely lifts the financial burden of unexpected Government delay from the contractor by requiring the payment of interest. Payment of the contract price, and any accrued interest penalties, will only be payable after acceptance (if a proper invoice has been received).

This section also amends 31 U.S.C. 3901(a)(4)(A) to make explicit that the "payment clock" is triggered when a proper invoice is received by the office or employee of the buying agency designated by the agency to first receive the invoice. Several commentators noted that under the Act's current language a contract might require an invoice to be first sent to a contracting officer's technical representative (COTR) or auditing activity rather than to the designated payment office which will subsequently be responsible for actually insuring the payment. Some agencies refuse to recognize the start of the "payment clock" until the invoice is received by the payment office. The time an invoice is in the hands of these other designated agency players, is not counted for the purpose of establishing whether timely payment has been made or a late payment interest penalty is due to the contractor. This provision requires an agency to start counting from the time it first receives a proper invoice.

Subsection (b) of this Section amends the Prompt Payment Act to explicitly cover the United States Postal Service (USPS). It was the intent of the sponsors of the legislation that became the Prompt Payment Act (S. 1131 and H.R. 4709 in the 97th Congress) that the USPS be covered by the Act's provisions. To attain that objective, the broad definition of "agency" found at Section 551(1) of Title 5 was used. However, a required amendment to the USPS's Organic statute was not made. This amendment corrects that oversight. The Committee is informed that the USPS has generally adjusted its bill paying procedures and practices to comport with the Act's standards, but the proposed amendment would statutorily assure USPS contractors the same protections accorded to contractors dealing with the departments and agencies of the Executive Branch. It should be noted that the amendment reserves to the Postmaster General the authority to implement the Act through the USPS's own procurement regulations.

The Subsection does exempt the USPS from reporting its compliance with the Act to the Office of Management and Budget, in recognition of its independent status. Nevertheless, the USPS is still required to maintain its own data concerning its bill paying performance in furtherance of effective cash management and to permit appropriate oversight by USPS senior management as well as the Congress.

### Section 4. Interest Penalties: Reductions in Grace Period; Increased Penalties

Subsection (a) of this Section would gradually eliminate the Prompt Payment Act's current 15-day "grace period", during which an agency may pay a bill late without incurring any interest penalty. For example, if payment for a routine commercial item is due in 30 days, the buying agency can now pay anytime up to 45th day without incurring any interest penalty for the late payment. The Act's "grace periods" were included in the Act from the House bill (H.R. 4709) at the request of the Administration. The justification for the "grace periods" was grounded in the argument that some mechanism was essential to protect the Government from the substantial administrative burden and expense anticipated from having to pay tens of thousands of small late payment interest penalties while the agencies adjusted their billpaying systems to the Act's standards—the anticipated result given the Government's dismal billpaying record at the time of enactment. Given that the Act provided almost six-months for agencies to effect and become effective at the beginning of a new fiscal year (October 1, 1982), agency transition to the Act's requirements was accomplished with substantially less trauma than predicted. OMB's first report to the Congress in February of 1984 emphasized this effective agency implementation.

Testimony from witnesses representing small business government contractors presented during the 99th Congress called for the immediate elimination of the 15-day grace period noting that the substantial improvements in agency billpaying practices being reported by OMB during the first three fiscal years of experience under the Act virtually eliminated the basic rationale for the grace period. Rather, these witnesses characterized the grace period as an interest-free loan taken from the pockets of those dealing with the Government that is readily and frequently abused by buying agencies. Rather than eliminate the 15-day grace period immediately, the bill initially reduces it to 7 days, deferring elimination until October 1, 1990. This very gradual elimination of the 15-day grace period is responsive to agency concerns.

Subsection (b) of this Section amends the Act to make explicit that interest penalties for late payment are to be paid automatically. Further, it seeks to deter agency finance center personnel from withholding a late payment interest penalty due to a contractor by making the agency liable for twice the interest penalty due under limited circumstances.

Testimony from witnesses representing small business government contractors cite experiences in which they had to make a formal written demand for late payment interest penalties due, despite the Act's clear intent and the explicit direction to the agencies in OMB Circular A-125 (Prompt Payment) that such penalties are to be paid "automatically". GAO found that some payment centers even had "informal" local policies of generally requiring a contractor to make a demand for interest due on a late payment. The likely origin for this reluctance to pay interest can be found in the standard by which OMB measures agency performance under the Act: on the basis of the number of invoices upon which the agency paid a late payment interest penalty. As noted by GAO, this performance measure maintains strong organizational pressures to both pay invoices on time (the objective of the Act) and to avoid paying interest even when it is due (an unintended side-

effect of the Act's current reporting requirement).

Subsection (c)(2) provides a countervailing pressure on payment center personnel who might be tempted to withhold payment of late payment interest penalties due contractors, so as to reduce the number of late invoices reported to OMB. Under the amendment, the contractor would become entitled to double any late payment interest penalty (not double the payment due for contract performance), if four conditions are met. First, the contractor must be entitled to a late payment penalty. Second, the agency must have actually made a payment to the contractor which did not include any late payment interest penalty. Third, the agency would have ten days from the date of its payment to the contractor to catch any inadvertent failure to pay the late payment interest penalty and to make such payment. Agency corrective action during the ten day period would eliminate the contractor's entitlement to the double interest penalty. And, finally, the contractor must make a written demand for the late payment interest penalty within forty days of the date of payment, so as to limit the Government's potential exposure.

Given these requirements and the improved internal management controls in most automated payment centers, the double late payment interest penalty authorized by this amendment to the Act could only be expected to fall upon those who would deliberately try to avoid paying a late payment interest penalty, so they look "good" in their reports to OMB. The current incentive to withhold late payment interest penalties in order to avoid OMB criticism is counteracted by this provision of the bill. Under the proposed amendment such unacceptable behavior will put the payment center or an individual payment clerk at risk of looking twice as "bad" than if the contractor were automatically paid the interest penalty due under the Act.

#### **Section 5. Interest Penalties on Progress Payments and Retained Amounts Under Construction Contracts**

This section makes explicit the intent of the Prompt Payment Act that progress payments under construction contracts are subject to the Act's requirements and protections. Despite explicit legislative history in the reports accompanying S. 1131 and H.R. 4709 that progress payments fall within the reach of the Act's provision affording coverage to payments for partial executions if authorized by the contract (31 U.S.C. 3903(4)), most agencies have determined by regulation that construction progress payments are "payments . . . made solely for financing purposes", which are exempt from coverage under OMB Circular A-125 (Para. 8(c)).

The section also extends the Act's coverage to amounts "retained" from progress payments paid to the contractor by the agency during the term of a construction contract. Contracting officers are authorized by regulation to retain a percentage of a program payment otherwise due a contractor upon making a specific finding concerning the timeliness of the contractor's performance, conformity with the contract specifications. Once such deficiencies have been corrected to the agency's satisfaction and the construction project accepted by the Government, the contractor is entitled to be paid these retained amounts as promptly as the final payment under the contract.

#### **Section 6. Periodic Payments Under Supply and Service Contracts**

This section clarifies 31 U.S.C. 3903 (4) with respect to the Act's application to vari-

ous periodic payments authorized under some supply and many service contracts. Testimony received reflected the fact that some agency buying personnel maintain that such payments are not subject to the Act, and hence not entitled to interest penalties for late payment. The agency's assert this position on the basis of two arguments. First, they may maintain that such periodic payments are not payments for work performed, but rather "payments solely for financing purposes", which have been explicitly exempted from the Act's protection under OMB Circular A-125. Or, second, they will avoid the Act's interest penalty on the basis that the contract does not include the "separate required payment dates" mentioned in the Act. Given that the FAR's menu of contract clauses was never modified to implement this among other provisions in the Prompt Payment Act, contractor's generally do not get paid interest penalties for late periodic payments. The bill makes a corresponding modification in Section 10, which requires the promulgation of FAR coverage to implement the Act.

#### **Section 7. Payment Clause for Subcontracts Under Construction Contracts**

This amendment adds a new section to the Prompt Payment Act which addresses the issue of extending the Act's coverage to subcontractors under federal construction contracts. The hearing record developed during the 99th Congress contains extensive and detailed testimony from witnesses representing subcontractors urging such coverage. They make a strong case that such coverage will contribute significantly to the timely completion of federal projects by eliminating one of the principal causes of delay: payment problems. Their testimony also made a strong case that such coverage is the only way to assure equitable treatment of subcontractors.

Subsection (a) of the proposed new section to the Act requires that the prime contractor include a payment clause in its contracts with its various subcontractors. It adopts "prevailing industry standards" as the payment term. The prevailing industry standard is currently deemed to be seven days, based upon a joint policy statement on prompt payment issued by the Associated General Contractors of America (AGC), the American Subcontractors Association (ASA), and the Associated Specialty Contractors (ASC), as well as an array of standard contract documents used extensively in the industry for both private and governmental construction projects. The Joint Policy Statement on Prompt Payment establishes a seven-day standard for payment of subcontractors after receipt of a payment by the prime contractor from the Owner (the Government). Similarly, the AGC's recommended standard form "Subcontract for Building Construction" (AGC Document No. 600, August 1984) provides for the payment of progress payments to subcontractors not later than seven days after receipt of a payment by the prime contractor. Finally, the Standard Form of Agreement Between Contractor and Subcontractor (Document A-401, 1978) issued by the American Institute of Architects (AIA), provides for the payment to the subcontractor of each progress payment and the final payment within three days after the prime contractor receives payment from the Owner.

Subsection (a)(1) provides that a prime contractor pay its subcontractors promptly, in accordance with prevailing industry standards, from amounts paid to the prime contractor by the Government, a so-called "pay when paid" relationship. This section, however, is not intended to impair a subcontractor's current legal right to pursue pay-

ments from prime contractors under existing law. For example, it does not establish payment by the Government as a condition precedent for a subcontractor to bring suit under the Miller Act (40 U.S.C. 270 a-d).

As with the Act's application between the prime contractor and the Government, the subcontractor's entitlement to timely payment, or interest penalties for late payment, only applies when no dispute exists as to performance. The subcontractor is not entitled to payment if his or her performance is not in conformity with the project schedule or the Government's specifications (which the prime contractor is required by its contract with the Government to include in its subcontracts). Similarly, the prime contractor may be entitled by its subcontract to withhold a portion of a payment for: (1) work that is in dispute; (2) third party claims, filed or reasonably expected to be filed; (3) alleged damages suffered by the prime contractor or another subcontractor; or (4) overdue subcontractor payments for labor, equipment or materials. However, to assure equitable treatment of subcontractors, it is essential that a prime contractor identify subcontractor performance deficiencies and other claims in its application for payment, and any accompanying certificate, to the Government and not request payment for amounts in dispute with the subcontractor until such dispute is resolved.

The resolution of any such performance dispute or other claim must remain subject to resolution between the parties to the subcontract and not be devolved upon the Government contracting officer for resolution. It should be noted, however, that Section 8(d) of the Small Business Act (15 U.S.C. 637(d)), as amended by the "Small Business and Federal Procurement Competition Enhancement Act of 1986", Public Law 98-577, would require the contracting officer to ensure compliance with the subcontract's provisions in the same manner as any other material provision of the subcontract.

Similarly, this provision does not create an entitlement for subcontractor's to share in late payment interest penalties received by a prime contractor by the Government. It operates when the prime contractor fails to pay the subcontractor in accordance with their subcontract out of funds received from the Government.

Finally, the provision does not prohibit the prime contractor from withholding retainage from progress payments otherwise due the subcontractor upon a finding of delay or other performance not in conformity with the performance requirements of the subcontract. The rate of such retainage, (the percentage of the progress payment otherwise due) should be not higher than the rate the Government withheld from the prime contractor.

Subsection (a)(2) entitles the subcontractor to a late payment interest penalty, if the prime contractor fails to pay the subcontractor in accordance with the payment clause required to be included in the contract between them. The interest rate specified is the same rate that is applied to late payments by the Government to the prime contractor.

Subsection (b) makes clear that the payment of any late payment interest penalties incurred by the contractor may not be passed along to Government, nor may the subcontractor pursue such late payment interest penalties with the Government.

#### **Section 8. Limitations on Discount Payment**

This section clarifies the time period during which an agency may legitimately take advantage of a contractor's offer of a

January 20, 1987

CONGRESSIONAL RECORD — SENATE

S 899

price discount for early payment. For example, a contractor may offer a 2% discount from its contract price in exchange for being paid by the Government within 30 days instead of the 30 days specified in its contract. The proposed amendment to the Prompt Payment Act makes clear that the discount period begins when a proper invoice is received by the first agency office designated in the contract. If the agency is to avail itself of the discount offered, it must make payment before the expiration of the period specified in the contractor's "fast pay" offer. The burden of accomplishing acceptance and other administrative matters prior to making payment against the contractor's proper invoice falls on the agency seeking to accept the discount price. Testimony from small business government contractors as well as the GAO review demonstrated that some agency payment centers have taken early payment discounts after the expiration of the discount period by not starting the "discount payment clock" until such time as acceptance and other administrative matters have been completed, irrespective of the time consumed by agency personnel. This amendment is designed to prevent such abuses.

#### Section 9. Reports

This section amends the Prompt Payment Act's reporting requirements to assure that data will be collected on the number and dollar value of invoices paid after the required payment date without payment of any interest penalty. The provision also requires the reporting agency to identify the reason a late payment interest penalty was not incurred. Currently, agencies are only reporting late invoices upon which an interest penalty was paid. GAO found that measurement of agency performance on the basis of this criteria has distorted the reports submitted to the Congress. This amendment will assure that OMB reports a more accurate and complete picture of agency compliance with the Act. The United States Postal Service (USPS) is specifically exempted from this reporting requirement to the Office of Management and Budget by Section 3(b) of the bill. However, as noted in the discussion of that provision, it is intended that the USPS collect data on its bill-paying performance to permit senior management to monitor compliance and to permit congressional oversight.

#### Section 10. Implementation Through the Federal Acquisition Regulation

Subsection (a) of this section requires that the Prompt Payment Act be implemented in the Federal Acquisition Regulation (FAR). No coverage is presently included, despite the fact that the FAR was issued subsequent to the enactment of the Prompt Payment Act.

Subsection (b) specifically identifies the provisions of the Act which require FAR implementation, principally through the issuance of appropriate solicitation provisions and contract clauses.

Paragraph (1) establishes parameters for the payment terms to be developed. The fundamental theme is to conform to prevailing market practice whenever possible. This is especially important when acquiring commercial items of supply or services (including construction) in which prevailing practices are defined principally by private commercial activity. When the Government enters an essentially commercial market, it should conform its payment terms to those of the market, unless compelling reasons dictate otherwise. It is also intended that these regulations will afford the contracting officer the flexibility to specify a payment term for an individual contract or a class of contracts that will most effectively tap the

market. It is favorably noted that the General Services Administration adopted this approach in Temporary Regulation 66 (Prompt Payment Procedures) to the former Federal Procurement Regulations (FPR) issued on October 5, 1982 to implement the Prompt Payment Act. Unfortunately, these regulations were not incorporated into the FAR, which superseded the FPR when the FAR became effective on April 1, 1984. Finally, the recently proposed FAR implementation of the Prompt Payment Act (51 Fed. Reg. 25976; July 17, 1986) suggests an unacceptably rigid system that would afford the Government at least a 30-day acceptance period and a 30-day payment period in every case. Such periods, when coupled with the currently available 15-day grace period, would effectively establish a minimum 75-day period before a contractor would be entitled to a late payment interest penalty.

Paragraph (2) provides guidance concerning the regulations addressing periodic payments in response to periodic invoices for supplies furnished or services performed during the term of a contract.

Paragraph (3) calls for regulations implementing the bill's amendment regarding periods for acceptance. The purposes of these amendments have been described previously in Section 3 (Definitions and Application) of this Section-by-Section analysis.

Paragraph (4) requires implementation of the Act's provisions relating to the Government's taking "early payment" discounts.

Paragraph (5) requires implementation of increased late payment interest penalties when the conditions of Section 4(c)(2) of the bill are met.

Subsection (c) specifies a time certain for issuance of proposed regulations and requires their publication for public comment.

#### Section 11. Effective Dates

This section establishes the effective dates for the bill's various provisions. Subsection (a) provides the agencies with an implementation period of at least 90 days for most of the bill's provisions. Subsection (b) establishes the effective date for the Prompt Payment Act's explicit application to the United States Postal Service. Subsection (c) requires OMB to change the agency reporting requirements under the Act beginning with FY 88.

#### COALITION FOR PROMPT PAY, January 14, 1987.

HON. JIM SASSER,  
HON. PAUL TRIBLE,  
U.S. Senate,  
Washington, DC.

DEAR SENATOR SASSER AND SENATOR TRIBLE: We have reviewed the prompt payment amendments you have prepared for introduction in the Senate and welcome this opportunity to comment on the bill.

The legislation you are introducing in the 100th Congress is almost identical to S. 2479 which was adopted by the Senate October 15, 1986 at the close of the 99th Congress. All of the provisions which were recommended during the hearings chaired by Senator Tribble and approved by the Senate Governmental Affairs Committee are in the bill you are introducing. The Coalition was in full support of the bill passed by the Senate last year.

Further, in introducing this bill, you are responding directly to the recommendations of the White House Conference on Small Business which met in Washington, DC in August 1986. The delegates from the 50 states made prompt payment by government agencies a top priority.

We welcome the introduction of your bill because the problem of late payments has not been resolved. There have been no ini-

tiatives by the executive branch to respond to the problems which were identified during hearings and debate on S. 2479.

Most of the solutions to the problem can only be achieved through the legislative remedy you are proposing and could not be accomplished by the executive branch without your bill. Therefore, on behalf of the Coalition for Prompt Pay, I am pleased to extend our support for your bill and to assure you and the cosponsors that we will work for passage of this bill during the 100th Congress.

Meanwhile, we wish to thank you both for joining in providing the leadership on prompt pay this year. We recall, Senator Sasser, your introduction of legislation on this subject in 1981, your testimony on this subject during the hearings that year, and your follow-through including statements in the Congressional Record and appropriation language urging improvements by the executive branch. And we recall, Senator Tribble, your steadfast balanced investigation of the problem in 1985 and 1986, your chairing of hearings, and your legislative leadership in steering the bill to final Senate passage. You have both demonstrated that prompt pay is a bipartisan matter which is consistent with the best interests of both government and the private sector.

We look forward to working with you and the cosponsors of your legislation in this Congress and wish you every success with the bill you are introducing.

Sincerely,

KENTON PATTIE,  
Director.

MEMBERS OF THE COALITION FOR PROMPT PAY  
International Communications Industries Association (ICIA).  
National Moving and Storage Association (NMSA).  
Association for Information and Image Management (AIIM).  
Door and Hardware Institute (DHI).  
American Subcontractors Association (ASA).  
Association of General Contractors, Rhode Island Chapter (AGC).  
National Association of Manufacturers (NAM).  
Small Business United (SBU).  
Coalition for Common Sense in Government Procurement.  
American Meat Institute (AMI).  
American Consulting Engineers Council (ACEC).  
Associated Specialty Contractors (ASC).  
National Electrical Contractors Association (NECA).  
Painting and Decorating Contractors of America (PDCA).  
Mechanical Contractors Association of America (MCAA).  
Mason Contractors Association of America (MCAA).  
Sheet Metal & Air Conditioning Contractors National Association (SMACNA).  
National Roofing Contractors Association (NRCA).  
National Association of Plumbing-Heating-Cooling Contractors (NAPHCC).  
National Association of Retail Druggists (NARD).  
National Insulation Contractors Association (NICA).  
National Association of Wholesales (NAW).  
National Association of Credit Management (NAOM).  
International Sanitary Supply Association (ISSA).  
Association of the Wall & Ceiling Industries—International (AWCI).  
American Association of Nurserymen.